(37,570)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 27

STATE OF MISSOURI AND FRANKLIN MILLER, ETC., PETITIONERS,

vs.

JOHANNA F. FISKE, AMANDA F. WHEELER, HENRIETTA A. HOLDOWAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. a] [Caption omitted]

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[fol. 2]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI

ORDER GRANTING STATE OF MISSOURI LEAVE TO INTERVENE AS A DEFENDANT—June 1, 1931

Now come the parties by their respective solicitors; whereupon the petitions of Johanna F. Fisk, et al., Sherman H. Kleinschmidt, et al., Clare E. Franz, et al., and Gustave A. Franz, Jr., et al., for distribution of remainder interest, as well as petition of trustees for directions in regard to distribution of trust estate are argued and submitted to the Court; thereupon the petition of Earl F. Nelson, Guardian ad litem, for allowance of compensation and expenses is heard and submitted to the Court.

And now it is Ordered that the separate motions of plaintiff (1) for modification of distribution and allowance of attorney's fees and expenses (2) for partial distribution of remaindermen, as well as (3) exceptions of plaintiff to certain reports of Trustees, and (4) motion of S. Mayner Wallace, original solicitor for plaintiff, praying that the estate of plaintiff be paid into the Registry of this Court, be, and the same are hereby, continued to the next motion day.

And now, by leave of Court, Mississippi Valley Trust Company, Administrator, c. t. a. of the estate of Ernst H. Franz, deceased, files herein its petition for distribution of remainder interests, which said petition is submitted to the Court. And now, by leave of Court, said Mississippi Valley Trust Company, as Administrator, c. t. a. of the estate of Walter G. Franz, deceased, also files herein its petition for distribution of remainder interests.

And now, by leave of Court, the application of the State of Missouri for leave to intervene herein, together with

separate notices to docket said application for hearing on this day, acknowledged by counsel for plaintiff and defendants, is filed; Whereupon, by agreement of parties, it is Ordered that said application be, and the same is hereby, granted, and that said petitioner is allowed five days from this date within which to file its formal intervening petition.

And now, by leave of Court, S. Mayner Wallace files herein his ancillary and supplemental bill for enforcement of solicitor's lien.

[fol. 3] IN UNITED STATES DISTRICT COURT

MOTION OF STATE OF MISSOURI FOR LEAVE TO INTERVENE—Filed June 1, 1931

Comes now Stratton Shartel, Attorney General of the State of Missouri, and for and in behalf of the State of Missouri, moves the Court to permit said State of Missouri to intervene as a party defendant in this cause, and for his reason states that a citation has been issued upon the application of the Circuit Attorney of the City of St. Louis, Missouri, in the Estate of Sophie Franz, No. 71459 in the Probate Court of the City of St. Louis, Missouri, to require Gustavus A. Buder, executor of said estate, to inventory certain assets alleged to have been owned by said Sophie Franz at her death, to-wit: 188,333⅓ shares of no par value common stock of the Burroughs Adding Machine Company, and that said citation is returnable in said court on the 12th day of June, 1931. That on the 5th day of May, 1927, this Court entered in this cause a decree to the effect that the plaintiff herein, Ehrhardt W. Franz, the Estate of Walter G. Franz, and the Estate of Ernest H. Franz, were then the owners each of an undivided 1/10 interest in remainder under the last will of Ehrhardt D. Franz, deceased, and that plaintiff and said estates would be entitled to the possession of said remainders upon the death of Sophie Franz as life tenant of said property, and that the defendant, Eleanor Kleinschmidt, as one of the heirs of Minna F. Kleinschmidt, deceased, was also the owner, jointly with other heirs, of an undivided 1/10 interest in remainder. That on or about the 13th day of May, 1930, the life tenant, Sophie Franz, departed this life and admin-

istration was begun upon her estate under the terms of her will, in Estate No. 71459 as heretofore mentioned, on the 13th day of May, 1930, and letters testamentary were issued to Gustavus A. Buder on the 14th day of May, 1930. That thereafter, to-wit, on the 17th day of May, 1930, Gustavus A. Buder and Gustav A. Franz, as trustees under the trust agreement of January 30, 1909, which trust agreement included all the properties in the estate of said Ehrhardt D. Franz, made application for instructions in the distribution of said properties in trust, and that the defendants Johanna F. Fiske, Amanda F. Wheeler, Otto B. Franz, Henrietta Holdoway, Adelaide Zimmerman, Sherman H. Kleinschmidt and Helen Kleinschmidt each made application for distribution of a share of the properties in said trust to them as remaindermen of Ehrhardt D. Franz, though this Court has never decreed that they had a vested remainder in the estate of Ehrhardt D. Franz. That the 188,333⅓ shares of no par value common stock of the Burroughs Adding Machine Company which Gustavus A. [fol. 4] Buder, as executor of the estate of Sophie Franz, deceased, failed to inventory in said estate, properly belonged to Sophie Franz in her own right at her death, subject only to the remainders heretofore adjudicated in this cause to be vested remainders, to-wit: those of Ehrhardt W. Franz, the Estate of Walter G. Franz, the Estate of Ernest H. Franz, and the interest of Eleanor Kleinschmidt as one of the heirs of Minna F. Kleinschmidt. That said Stock is now being held by Gustavus A. Buder and Gustav A. Franz as trustees under the trust of January 30, 1909 and should be turned over to Gustavus A. Buder as executor of the estate of Sophie Franz and inventoried by him as such. That Gustavus A. Buder and Gustav A. Franz as trustees and Johanna F. Fiske, Amanda F. Wheeler, Otto B. Franz, Henrietta Holdoway, Adelaide Zimmerman, Sherman H. Kleinschmidt and Helen Kleinschmidt have all served notice on counsel for various parties herein that they intend on the 1st day of June, 1931, to take up their respective motions to distribute and should this Court act upon said motions and distribute to any parties other than Ehrhardt W. Franz, the Estate of Walter G. Franz, and the Estate of Ernest H. Franz and Eleanor Kleinschmidt, that said 188,333⅓ shares of stock will be distributed to parties who have no interest therein and will not be inventoried as

a part of the Estate of Sophie Franz, deceased. That the estate of Sophie Franz, deceased, is subject to the Inheritance Tax Laws of the State of Missouri, and the State of Missouri upon the death of Sophie Franz acquired a lien upon all property belonging to said Sophie Franz at her death. That it is necessary to protect the interests of the State of Missouri in the assessment and collection of inheritance taxes upon all properties belonging to said Sophie Franz at her death, that said State of Missouri be permitted to intervene as a party defendant herein so that it may file proper pleading in opposition to the motions of Gustavus A. Buder and Gustav A. Franz, trustees and Johanna F. Fiske, Amanda F. Wheeler, Otto B. Franz, Henrietta Holdoway, Adelaide Zimmerman, Sherman H. Kleinschmidt and Helen Kleinschmidt, pending the termination of the issues involved in the Estate of Sophie Franz in the Probate Court of the City of St. Louis, Missouri.

Wherefore this applicant prays that he be permitted to intervene as a party defendant in this cause and to file such pleadings and offer such proof as is necessary to protect its rights, and that an order be entered making the State of Missouri a party defendant herein.

Stratton Shartel, Henry Stern, and Richmond C. Coburn.

[fol. 5] *Duly sworn to by Richmond C. Coburn. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

INTERVENING PETITION OF THE STATE OF MISSOURI—Filed June 6, 1931

Comes now Stratton Shartel, Attorney General of the State of Missouri, and for and in behalf of the State of Missouri, for its intervening petition states that on the 5th day of May, 1927, this Court entered in this cause a decree finding that Ehrhardt W. Franz, the estate of Walter G. Franz, and the estate of Ernest H. Franz, were the owners, each, of an undivided one-tenth (1/10) interest in remainder under the last will of Ehrhardt D. Franz, deceased, and that plaintiff and said estates would be entitled to the possession

of said remainders upon the death of Sophie Franz as life tenant of said property, and that the defendant, Eleanor Kleinschmidt, as one of the heirs of Minna F. Kleinschmidt, deceased, was also the owner, jointly with other heirs, of an undivided one-tenth (1/10) interest in the remainder. That said decree made no finding as to the other children of Ehrhardt D. Franz, deceased, and their descendants. The intervener states that, although the remaining children of Ehrhardt D. Franz, deceased, were by said deceased's will given remainders of an undivided one-tenth (1/10) interest each in his estate, all of said children and their descendants, other than those found to have a vested remainder in the decree aforesaid, prior to the entry of said decree, by diverse acts and by pleadings filed in this cause extinguished, transferred and assigned their remainder interest to the life tenant, Sophie Franz. That on or about the 13th day of May, 1930, the life tenant, Sophie Franz, departed this life, and administration was begun upon her estate under the terms of her will, in the Probate Court of [fol. 6] the City of Saint Louis, Missouri, Estate No. 71459, as heretofore mentioned, and letters testamentary were issued to Gustavus A. Buder on the 14th day of May, 1930. That said Buder filed his inventory in said estate, but failed to inventory therein 188,333⅓ shares of no par value common stock of the Burroughs Adding Machine Company, which stock at the date of the death of Sophie Franz had a market value of Forty-eight ($48.00) Dollars per share. That said stock is now in the custody of Gustavus A. Buder and Gustav A. Franz, as trustees, under a certain trust created by Sophie Franz during her life time, and are now preparing to divide said stock equally among the children of Ehrhardt D. Franz, deceased, and their descendants. Although this Court has only determined that plaintiff herein, the estate of Walter G. Franz, the estate of Ernest H. Franz and Eleanor Kleinschmidt have remainder interests, and are entitled to any portion thereof, the children and their descendants, other than those whose rights were adjudicated in the decree of May 5, 1927, have moved this Court for distribution to them. That said stock, except that portion thereof which belongs to plaintiff, the estate of Walter G. Franz, the estate of Ernest H. Franz and Eleanor Kleinschmidt, was owned by Sophie Franz at her death, should have been inventoried, and is sub-

ject to the assessment and collection of inheritance taxes of the State of Missouri under the terms of the will of Sophie Franz, deceased, and the State of Missouri since the date of the death of said Sophie Franz, to-wit: May 13, 1930, has had and now has a lien upon said stock for said taxes. That the Circuit Attorney of the City of Saint Louis, Missouri, pursuant to the Inheritance Tax Laws of said state, has made application for the issuance of a citation in the estate of Sophie Franz, deceased, against the executor, thereof, to require him to inventory said stock. That said citation has been served and is returnable on June 12, 1931. That the Attorney General, pursuant to request from the Treasurer of the State of Missouri, has entered his appearance in said proceedings to assist the Circuit Attorney therein.

Wherefore this intervener prays that a portion of said stock to secure the assessment and collection of Inheritance Taxes of the State of Missouri on said stock under the terms of the will of Sophie Franz, deceased, be transferred by said Gustavus A. Buder and Gustav A. Franz, trustees, to the registry of this Court to be there held until it may be determined in the Probate Court of the City of Saint Louis whether said stock should have been inventoried therein by [fol. 7] Gustavus A. Buder, as executor of the estate of Sophie Franz.

Stratton Shartel, Henry Stern, Richmond C. Coburn.

Duly sworn to by Richmond C. Coburn. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

ANCILLARY AND SUPPLEMENTARY BILL OF COMPLAINT FOR AN INJUNCTION—Filed June 10, 1931

Come now Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman and Otto B. Franz, defendants in the above entitled cause, and for their ancillary bill for an injunction against the State of Missouri, intervener herein, and its attorneys of record, state that, at the time of the filing of the original bill and at the time of the filing of the amended bill herein, and at present, Jo-

hanna F. Fiske was, and is, a citizen of the State of New Mexico, at all times a resident thereof, residing therein; that Amanda F. Wheeler and Otto B. Franz were, and are, citizens of the State of California, at all times residents thereof, residing therein, and that Henrietta A. Holdoway and Adelaide Zimmerman were, and are, citizens of the State of Illinois and at all times residents thereof, residing therein; and that the State of Missouri is, and has been, a party in this cause since its intervention herein on the 1st day of June, 1931; that Stratton Shartel at all times herein mentioned was, and is, the Attorney General of the State of Missouri; that Franklin Miller at all times herein mentioned was, and is, the Circuit Attorney of the City of St. Louis, State of Missouri; and that Stratton Shartel, [fol. 8] Franklin Miller, Richmond C. Coburn and Henry H. Stern, and each of them, are attorneys, counselors and solicitors for, and in behalf of, the State of Missouri in the matters, things and proceedings herein mentioned; and that said Stratton Shartel, Franklin Miller, Richmond C. Coburn and Henry H. Stern were, at the time of the filing of the intervening petition of the State of Missouri on June 6, 1931, and still are, citizens of, and at all times residents of and residing in the State of Missouri; that this is a suit of a civil nature in equity where the matter in controversy exceeds, exclusive of interest and costs, the value of Three Thousand ($3,000.00) Dollars and is between a state and citizens of different states and between citizens of different states.

Complainants Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide M. Zimmerman, and Otto B. Franz state that each of them is the owner of a one-tenth vested remainder interest in the Estate of Ehrhardt D. Franz, deceased, as ascertained and decreed by this Court, and that each of them is entitled to receive from G. A. Franz and G. A. Buder, Trustees, subject to various fees, commissions, expenses, deductions and a claim for Federal income taxes, 28,250 shares of stock of the Burroughs Adding Machine Company, a Michigan corporation, in satisfaction and discharge of said remainder interest; and said complainants further state that they and each of them have petitioned this Court, and this Court now has under submission their various petitions, for the distribution of said remainder interests.

Complainants further state that the above named interveners, the State of Missouri, and its attorneys aforesaid, did, on the 19th day of March, 1931, file in the Probate Court of the City of St. Louis, State of Missouri, in the matter of the Estate of Sophie Franz, deceased, No. 71,459, an affidavit for citation to require G. A. Buder, Executor of the Estate of Sophie Franz, deceased, to inventory certain assets, by which they seek to force and compel Gustavus A. Buder, the Executor of the said Estate of Sophie Franz, deceased, to inventory as an asset of said Estate 188,333-⅓ shares of stock of the Burroughs Adding Machine Company, a Michigan corporation, the said stock being the same shares owned by the above named complainants and G. A. Franz, Sherman Kleinschmidt and Helen Kleinschmidt, and to which they are now entitled as aforesaid; that pursuant to said affidavit there has issued and has been served upon Gustavus A. Buder a citation for concealment of property alleged to belong to the Estate of Sophie Franz, deceased, contrary to the decree of this Court as aforesaid, and com-
[fol. 9] manding said Gustavus A. Buder to be and appear in the Probate Court of the City of St. Louis on the 12th day of June, 1931, at 10:00 o'clock A. M. of that day in order to submit to an examination for the discovery of said personal property; that at said time, unless enjoined, the defendants herein, and each of them, will attempt and endeavor to obtain orders, decrees and judgments adverse and prejudicial to the rights and interests of the above named plaintiffs in this cause in this Court and orders, decrees and judgments which will prejudicially affect, impair and defeat the jurisdiction of this Honorable Court and the decree rendered by it in the premises.

Complainants further state that unless the attempts, endeavors and actions contemplated by the above named defendants, as aforementioned, are prevented by this Court, plaintiffs will suffer immediate and irreparable injury, loss and damage.

Wherefore, the premises considered, complainants pray for a writ of injunction enjoining the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H. Stern, and each of them, from directly or indirectly

prosecuting further the said citation in the Probate Court of the City of St. Louis, State of Missouri, in the matter of the Estate of Sophie Franz, deceased, No. 71459, and particularly from seeking or obtaining any order, decree or judgment therein until the further direction of this Honorable Court; and, to the end that the said injury may be prevented and the jurisdiction of this Honorable Court, and its orders and decrees herein, may be upheld, maintained, sustained and preserved, the above complainants also pray the issuance of a preliminary injunction to the effect above set forth until the hearing of this ancillary and supplemental bill of complaint. Plaintiffs further pray for any and all other and further relief in the premises, including costs, which to this Honorable Court shall seem meet and proper.

G. A. Buder, Jr., and Oscar E. Buder, Their Solicitors and Attorneys.

Duly sworn to by Oscar E. Buder. Jurat omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

ANSWER OF JOHANNA F. FISKE ET AL. TO INTERVENING PETITION OF THE STATE OF MISSOURI—Filed June 15, 1931

Come now Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman, Otto B. Franz, Gustav A. Franz, Sherman H. Kleinschmidt and Helen Kleinschmidt, defendants in the above entitled cause, and, leave of Court having been first had and obtained, file this their answer to the intervening petition of the State of Missouri heretofore filed herein on the 6th day of June, 1931.

Said defendants admit that on the 5th day of May, 1927, this Court entered in this cause a decree finding that Ehrhardt W. Franz, the Estate of Walter G. Franz and the Estate of Ernest H. Franz, were the owners each of an undivided one-tenth interest in remainder under the last will of Ehrhardt D. Franz, deceased, and that said plaintiff and said Estates would be entitled to the possession of said re-

mainders upon the death of Sophie Franz, as life tenant of said property, and that defendant Eleanor Kleinschmidt, as one of the heirs of Minna F. Kleinschmidt, deceased, was also the owner, jointly with other heirs, of an undivided one-tenth interest in said remainder.

Said defendants admit that Sophie Franz, the life tenant, departed this life on or about the 14th day of April, 1930, and that administration was begun upon her Estate under the terms of her will, in the Probate Court of the City of St. Louis, Missouri, Estate No. 71459, and that letters testamentary were issued to Gustavus A. Buder on the 14th day of May, 1930; and further admit that the no par value common stock of the Burroughs Adding Machine Company [fol. 11] had a market value of Forty-eight ($48.00) Dollars per share at the date of the death of said Sophie Franz; and further admit that these defendants have petitioned this Honorable Court, and that this Honorable Court has under submission their several petitions, for distribution of their respective remainder interests in and to the Estate of Ehrhardt D. Franz, deceased, hereinafter mentioned and referred to.

Said defendants further admit that the Circuit Attorney of the City of St. Louis, Missouri, has made application for the issuance of a citation in the Estate of Sophie Franz, deceased, against the Executor thereof, to require him to inventory 188,333-1/3 shares of the no par value common stock of the Burroughs Adding Machine Company; that said citation has been served and was returnable on June 12, 1931; and further admit that the Attorney General has entered his appearance in said proceedings.

For answer and defense to said intervening petition of the State of Missouri said defendants expressly deny that the decree of this Court entered in this cause on the 5th day of May, 1927, as aforesaid, confined its finding of the existence and ownership of interests in remainder under the last will of Ehrhardt D. Franz, deceased, to Ehrhardt W. Franz, the Estate of Walter G. Franz, the Estate of Ernest H. Franz, and Eleanor Kleinschmidt; and further deny that said decree made no finding as to these defendants and the existence of their respective remainder interests; and further deny that these defendants, or any of them, at any time extinguished, transferred or assigned their respective remainder interests to the life tenant, Sophie Franz.

Said defendants further deny that Gustavus A. Buder, the Executor of the Estate of said Sophie Franz, deceased, has failed to inventory therein any stock of the Burroughs Adding Machine Company owned by said Sophie Franz at the time of her death; and further deny that any of the stock mentioned and referred to in the intervening petition was owned by Sophie Franz at her death, deny that it should have been inventoried, deny that it is subject to the assessment and collection of inheritance taxes of the State of Missouri under the terms of the will of Sophie Franz, deceased, and deny that the State of Missouri has now, or has at any time had, a lien thereon for inheritance taxes.

Said defendants further state that the last will and testament of Ehrhardt D. Franz, deceased, contained, among others, the following provision, to-wit:

[fol. 12] "The rest, residue and remainder of my estate, whether real, personal or mixed property, I give, bequeath and devise unto my beloved wife Sophie Franz, for and during the period of her natural life. After the termination of the life estate of my wife, I give, bequeath and devise the remainder in equal shares, share and share alike, unto my children, Minna, Johanna, Ehrhardt, Ernest, Amanda, Gustav, Walter, Otto, Henrietta and Adelaide, and unto their respective heirs and assigns forever";

that defendants Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman, Otto B. Franz and Gustav A. Franz are the children and parties referred to in said provision of the last will and testament of Ehrhardt D. Franz, deceased, as Johanna, Amanda, Henrietta, Adelaide, Otto, and Gustav, respectively; that Sherman H. Kleinschmidt is the widower of Minna Kleinschmidt, deceased, she being the child and party referred to in said provision of the last will and testament of Ehrhardt D. Franz, deceased, as Minna, and that Helen Kleinschmidt is one of the two children of said Minna Kleinschmidt, deceased, and that each of them is the owner of an undivided one-third of the said remainder interest of said Minna Kleinschmidt in the Estate of Ehrhardt D. Franz, deceased. Said defendants further state that this Court has decreed in this cause, and that the United States Circuit Court of Appeals for the Eighth Circuit, has held in and upon various appeals from the orders and decrees of this Court in this

cause that each of the children and parties mentioned in said provision of the last will and testament of Ehrhardt D. Franz, deceased, was, and is, the owner of an undivided one-tenth interest in remainder under the last will of Ehrhardt D. Franz, deceased; and further found and decreed that the stock dividends declared and issued by the Burroughs Adding Machine Company during the existence of the life Estate were not income belonging to Sophie Franz, the life tenant, but were, and are, accretions to the corpus of the Estate of Ehrhardt D. Franz, deceased, belonging to the remaindermen specified in the will of Ehrhardt D. Franz, deceased; that these defendants have not undertaken, done or caused to be done any acts or deeds which have or would have extinguished, transferred or assigned their respective remainder interests to the life tenant, Sophie Franz; and that the existence of the remainder interests of these defendants is res adjudicata.

[fol. 13] Wherefore said Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman, Otto B. Franz, Gustav A. Franz, Sherman H. Kleinschmidt and Helen Kleinschmidt, prays that their respective remainder interests in and to the Estate of Ehrhardt D. Franz, deceased, be reaffirmed and further adjudicated, declared and determined and that their said respective remainder interests be recognized, guarded and protected against the alleged claims and demands of the State of Missouri; that the intervening petition of the State of Missouri herein, and the prayer thereof, be dismissed, overruled and denied, and that the Court sustain the respective motions of these defendants for distribution of their respective remainder interests in and to the Estate of Ehrhardt D. Franz, deceased, which said motions are now under submission in and before this Honorable Court.

Buder & Buder, Attorneys for Answering Defendants.

In United States District Court

Motion to Dismiss Ancillary and Supplemental Bill of Complaint for an Injunction—Filed June 29, 1931

Comes Now the State of Missouri and appearing for the purpose of this motion only and as an intervener moves this

Court to dismiss the ancillary and supplemental bill of complaint for an injunction of Johanna F. Fiske, et al., in this cause for the following reasons, to-wit:

1. Said ancillary and supplemental bill of complaint does not state facts sufficient to warrant the intervention of equity.

2. That it appears upon the face of the ancillary and supplemental bill of complaint that the Court does not have jurisdiction thereof and to grant the relief prayed for herein, in that;

(a) That on the first day of June, 1931, by an order of this Court the State of Missouri was admitted to this cause as an intervener only and not as a party plaintiff or defendant; that Stratton Shartel on said date was and now is the duly elected, qualified and acting Attorney General of the State of Missouri and appears as counsel on behalf of the State of Missouri in this cause and in the proceedings in the Probate Court in said capacity; that Franklin Miller on said date was and now is the duly elected, qualified and acting Circuit Attorney of the City of St. Louis, Missouri, a public [fol. 14] officer of the State of Missouri, and appears as counsel in the proceedings in the Probate Court in that capacity and that Henry H. Stern on said date was and now is a duly appointed Assistant Attorney General of the State of Missouri and Richmond C. Coburn was on said date and now is a duly appointed Special Assistant Attorney General of the State of Missouri and both appear in the proceedings in the Probate Court and in this cause as counsel for the State of Missouri in said capacities.

That this Court is without jurisdiction to entertain the ancillary and supplemental bill of complaint for an injunction against the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, Missouri, Henry H. Stern, Assistant Attorney General of the State of Missouri, and Richmond C. Coburn, Special Assistant Attorney General of the State of Missouri, for the reason that it appears upon the face of the bill of complaint that the complainants in said ancillary and supplemental bill in substance seek to enjoin the State of Missouri from a proceeding in the Probate Court of the City of St. Louis, State of Missouri (which proceeding is an action to compel Gustavus A. Buder, as

executor of the estate of Sophie Franz, deceased, to inventory certain property belonging to said Sophie Franz at her death). That the State of Missouri under the 11th Amendment to the Constitution of the United States is immune from suit and said State of Missouri has not consented that it be sued in this cause or any proceeding seeking the restraint of proceedings in the Probate Court.

(b) It appears from the face of the defendants' ancillary and supplemental bill of complaint that said defendants seek an injunction to stay proceedings in a court of the State of Missouri, to-wit, the Probate Court of the City of St. Louis, State of Missouri, in violation of Section 265 of the Judicial Code of the United States.

(c) The relief prayed for in the ancillary and supplemental bill of complaint prays this Court to enter a decree which would interfere with the proper administration of an estate in the Probate Court of the City of St. Louis, Missouri, to-wit, that of Sophie Franz, deceased, No. 71459.

Stratton Shartel, Henry Stern, Richmond C. Coburn,
Attorneys for Intervener, State of Missouri.

[fol. 15] IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING MOTION OF STATE OF MISSOURI TO DISMISS ANCILLARY AND SUPPLEMENTAL BILL OF COMPLAINT OF JOHANNA F. FISKE ET AL.—NOV. 2, 1931

Now, the Court having considered the motion of the State of Missouri, intervener herein, to dismiss the verified application of defendants, Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman and Otto B. Franz, for an injunction,

It is Ordered that said motion of Intervener be, and the same is hereby, sustained in oral opinion this day announced.

(Signed) C. B. Faris, Judge.

Dated November 2, 1931.

IN UNITED STATES DISTRICT COURT

OPINION OF COURT—Filed Nov. 19, 1931

There was submitted some time ago, in this case, a motion to dismiss an ancillary bill for injunction, which ancillary bill was brought by the Trustees Franz and Buder against the State of Missouri to enjoin it from prosecuting further its intervening petition in this cause. This motion to dismiss was bottomed upon two propositions, or, rather, upon one proposition to which a secondary one was incidental.

The State of Missouri had come in here alleging that it had a lien on the fund, or a part of it, in the custody of this Court, for certain inheritance taxes. It proposed by its intervention to set up that lien. Thereupon, the plaintiff in the ancillary proceeding for an injunction brought an action against the State of Missouri, in effect, as forecast, to halt the State of Missouri's action in the behalf mentioned.

It is urged here in the motion to dismiss the ancillary bill for an injunction, that the State of Missouri being a sovereign cannot be sued in this situation, and that the mere fact that it intervened in order to obtain its part of an alleged lien for inheritance taxes does not warrant a suit against it, absent a plenary statute so providing.

To my mind it is very clear that that defense on the part of the State of Missouri ought to be sustained. The State of Missouri came in not as a regular defendant in the case, [fol. 16] because the case had years ago gone to a final decree; therefore it could not become, strictly speaking, a defendant. It did not, in other words, inject itself into the case as a regular defendant, if I may so express it, but it came in, in order to protect its own interest. I think it had a right to do that, other things being equal. I am not passing now, mark you, upon the merits of the case.

The situation arose very recently in numerous cases in the Southeastern Division, where a county collector and certain levee and drainage districts came forward, after judgment, and urged a lien upon the proceeds of the main proceeding then in the registry of the Court. It seemed to me, in those cases, to be perfectly clear that the district and the county collector had the right, if they had a lien upon the fund in the hands of the Court, to assert that lien

and it did not make them parties, that is to say, the assertion of a lien did not make them ordinary parties.

I think the State of Missouri here is not an ordinary party. It is a proceeding in the nature of that situation expressed by the three Latin words pro interesse suo. It came in, I repeat, in order to protect its own interest, without regard to any interest in the main proceeding of either the plaintiff or the defendant. I think it had a right to do that, and I do not think, having done so, that it is liable to be sued (absent its consent and absent a general statute giving consent) unless it is willing to be sued, and the fact that it has filed a motion to dismiss indicates very clearly its unwillingness to be sued.

A number of years ago I had the same situation up, perhaps in a closer case than this, wherein the Republic of France had sued, in this Court, the Inland Navigation Company, a boat-building concern (La Republique Francaise vs. Inland Navigation Co., 263 Fed., 410). The boat-building concern put forward a counterclaim. After a very careful investigation of the authorities I took the view that it was not suable, absent its consent. There is some doubt upon that proposition. One court has passed upon a similar proposition and held that it could be sued; another court has lately held that it could not be sued, and cited my opinion, among others, for the position it took. The two questions are not precisely parallel, but I think that they are analogous.

So, the motion to dismiss the ancillary bill of injunction against the State of Missouri will be sustained.

St. Louis, Missouri, November 2, 1931.

[fol. 17] IN UNITED STATES DISTRICT COURT

NOTICE TO TAKE UP INTERVENING PETITION OF THE STATE OF MISSOURI—Filed Nov. 27, 1931

To Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman, Otto B. Franz, Gustav A. Franz, Sherman H. Kleinschmidt, and Helen Kleinschmidt, defendants in the above-entitled cause, or Buder & Buder, their attorneys of record:

That on the 7th day of December, 1931, at ten o'clock A. M. or as soon thereafter as it may be heard, the inter-

vener, State of Missouri, will present its intervening petition to this Court for the entry of the order therein prayed or any other conforming with the proof.

Stratton Shartel, Henry Stern, Richmond C. Coburn,
Attorneys for Intervener, State of Missouri.

Copy of the foregoing received this 27th day of November, 1931.

(Signed) Buder & Buder.

IN UNITED STATES DISTRICT COURT

ORDER DISMISSING CAUSE OF ACTION OF JOHANNA F. FISKE, AMANDA F. WHEELER, HENRIETTA A. HOLDOWAY, ADELAIDE ZIMMERMAN, AND OTTO B. FRANZ UPON THEIR ANCILLARY BILL OF COMPLAINT FOR AN INJUNCTION, ETC.—Dec. 3, 1931

The motion of the State of Missouri to dismiss the ancillary and supplemental bill of complaint of Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman and Otto B. Franz for an injunction against the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H. Stern having been heretofore sustained on the 2nd day of November, 1931, and it now appearing to the satisfaction of the Court that said defendants Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman and Otto B. Franz have refused and declined to plead further upon said [fol. 18] matter, it is ordered that the cause of action of said defendants for an injunction, as aforesaid, be and it is hereby dismissed and a final judgment and decree entered thereon in favor of the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H. Stern and against Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman and Otto B. Franz.

C. B. Faris, Judge.

Dated Dec. 3d, 1931.

3—27

In United States District Court

Petition of Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman, and Otto B. Franz for an Appeal—Filed Dec. 3, 1931

Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz, defendants in the above entitled cause, deeming themselves aggrieved by the order and decree made, rendered and entered herein on November 2, 1931, dismissing their ancillary and supplemental bill of complaint for an injunction, and the final judgment and decree rendered and entered pursuant thereto on the third day of December, 1931, and by the proceedings in this cause, by their solicitors file herewith their assignment of errors and pray that they be allowed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit.

Buder & Buder, Solicitors for Petitioners.

In United States District Court

Order Granting Appeal—Filed Dec. 3, 1931

Now on this day come Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B, Franz, defendants in the above entitled cause, and file herein their petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the order and decree made, rendered and entered herein on November 2, 1931, dismissing their ancillary and supplemental bill of complaint for an injunction, the final judgment and decree this day rendered and entered pursuant thereto and the proceedings in [fol. 19] this cause, together with their assignment of errors on such proposed appeal, upon consideration whereof it is ordered that an appeal be, and it is hereby, allowed said defendants as prayed upon their giving a bond for costs in the sum of Five Hundred Dollars ($500.00).

And now said defendants present herein their cost bond on appeal in the penal sum of Five Hundred Dollars

($500.00), which bond is duly approved and filed and a citation issued.

C. B. Faris, Judge.

Dated Dec. 3d, 1931.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS BY JOHANNA F. FISKE, AMANDA F. WHEELER, HENRIETTA A. HOLDOWAY, ADELAIDE ZIMMERMANN, AND OTTO B. FRANZ—Filed Dec. 3, 1931

Come now defendants, Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz, and file this, their assignment of errors in, to and upon the order and decree made, rendered and entered by the Court herein on the 2nd day of November, 1931, and the final judgment and decree rendered and entered pursuant thereto on the third day of December, 1931, and in the record and proceeding in the above entitled cause; and they further aver, allege and state the fact to be that there is harmful and manifest error herein in the following particulars, to-wit:

1. The District Court erred in sustaining the motion of the State of Missouri to dismiss the ancillary and supplemental bill of complaint of these defendants for an injunction against the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H. Stern, to prevent them from prosecuting further in the Probate Court of the City of St. Louis, State of Missouri, the citation against G. A. Buder, as the Executor of the Estate of Sophie Franz, deceased, to require him to inventory as part of said estate certain stock dividends of the Burroughs Adding Machine Company heretofore held by this Court to belong to the Estate of Ehrhardt D. Franz, deceased.

2. The District Court erred in dismissing the ancillary and supplemental bill of complaint of these defendants for [fol. 20] an injunction against the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H.

Stern, to prevent them from prosecuting further in the Probate Court of the City of St. Louis, State of Missouri, the citation against G. A. Buder, as the Executor of the Estate of Sophie Franz, deceased, to require him to inventory as part of said estate certain stock dividends of the Burroughs Adding Machine Company heretofore held by this Court to belong to the Estate of Ehrhardt D. Franz, deceased.

3. The District Court erred in failing and refusing to overrule the motion of the State of Missouri to dismiss the ancillary and supplemental bill of complaint of these defendants for an injunction against the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H. Stern, to prevent them from prosecuting further in the Probate Court of the City of St. Louis, State of Missouri, the citation against G. A. Buder, as the Executor of the Estate of Sophie Franz, deceased, to require him to inventory as part of said estate certain stock dividends of the Burroughs Adding Machine Company heretofore held by this Court to belong to the Estate of Ehrhardt D. Franz, deceased.

4. The District Court erred in making, rendering and entering the order and decree in this cause made, rendered and entered on the 2nd day of November, 1931.

5. The District Court erred in finding, ordering, adjudging and decreeing that the State of Missouri was merely a defendant pro interesse suo, and as such had not waived its immunity from suit and had not submitted to the jurisdiction of the District Court or consented to be sued.

6. The District Court erred in failing and refusing to order, adjudge and decree that the State of Missouri had waived its immunity from suit and had submitted to the jurisdiction of this Court by reason of filing herein its intervening petitions on the 1st day of June, 1931, and the 6th day of June, 1931, respectively.

7. The District Court erred in failing and refusing to order, adjudge and decree that the State of Missouri had waived its immunity from suit by voluntarily becoming a

party to this cause and submitting its rights for judicial determination.

[fol. 21] 8. The District Court erred in finding, ordering, adjudging and decreeing that it had acquired and possessed no jurisdiction over the State of Missouri in this cause and in finding, ordering, adjudging and decreeing that the State of Missouri was not subject to the injunctive powers of the District Court to preserve and protect its jurisdiction over this cause.

(Signed) Buder & Buder, Solicitors for Appellants.

Bond on appeal for $500.00, approved and filed December 3, 1931, omitted in printing.

[fol. 22] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed Dec. 4, 1931

The Clerk of the District Court is requested to copy for transmission to the United States Court of Appeals upon the appeal of Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz from the order and decree made, rendered and entered herein on November 2, 1931, the following portions of the record of this cause:

1. The intervening petition of the State of Missouri filed herein on the 1st day of June, 1931.

2. The order of the District Court made and entered on the 1st day of June, 1931, granting the application of the State of Missouri to intervene as a party defendant in this cause and allowing said State of Missouri five days within which to file its formal intervening petition.

[fol. 23] 3. The intervening petition of the State of Missouri filed herein on the 6th day of June, 1931.

4. The ancillary and supplementary bill of complaint for an injunction filed herein by Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz on the 10th day of June, 1931.

5. The answer of Johanna F. Fiske, et al., to the intervening petition of the State of Missouri, filed herein on the 15th day of June, 1931.

6. The motion of the State of Missouri filed herein on the 29th day of June, 1931, to dismiss the ancillary and supplemental bill of complaint for an injunction theretofore filed herein by Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz, together with the order of submission on July 1, 1931.

7. The order and decree of the District Court made, rendered and entered on the 2nd day of November, 1931, sustaining the motion of the State of Missouri to dismiss the ancillary and supplemental bill of complaint for an injunction theretofore filed herein by Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz.

8. The memorandum filed herein on the 19th day of November, 1931, of the oral opinion of the District Court theretofore delivered on the 2nd day of November, 1931.

9. The notice of the State of Missouri filed herein on the 27th day of November, 1931, to docket its intervening petition.

10. Refusal of defendants Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz to plead further upon the matter of their ancillary bill for an injunction against the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H. Stern, announced on the 3rd day of December, 1931.

11. The final order, judgment and decree made and entered on the 3rd day of December, 1931, against defendants Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz upon their said ancillary bill for an injunction.

[fols. 24 & 25] 12. The formal appeal papers pertaining to the instant appeal.

(Signed) Buder & Buder, Solicitors for Appellants.

Receipt of copy of the foregoing præcipe for transcript acknowledged this 4th day of December, 1931.

Stratton Shartel, Attorney General of State of Missouri. Richmond C. Coburn. Franklin Miller, Circuit Attorney, by Frank X. Reller, Chief Clerk.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR FILING TRANSCRIPT OF RECORD ON APPEAL—Filed Jan. 12, 1932

Upon application, and for good cause shown, it is Ordered that the time for lodging the transcript of record in the United States Circuit Court of Appeals for the Eighth Circuit be, and the same is hereby extended to and including February 10, 1932.

C. B. Faris, U. S. District Judge.

Jan. 12, 1932.

Clerk's certificate to foregoing transcript omitted in printing.

[fols. 26 & 27] Appearances of counsel omitted in printing.

[fol. 28] Minute entry of argument and submission, May 17, 1932, omitted in printing.

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, NOVEMBER TERM, A. D. 1932

No. 9428.

JOHANNA F. FISKE et al., Appellants,

vs.

STATE OF MISSOURI et al., Appellees

Appeal from the District Court of the United States for the Eastern District of Missouri

Mr. G. A. Buder, Jr. (Mr. O. E. Buder was with him on the brief); for appellants.

Mr. Henry H. Stern, Special Assistant Attorney-General, State of Missouri (Mr. Stratton Shartel, Attorney-General, State of Missouri, and Mr. Richmond C. Coburn, Special

Assistant Attorney-General, State of Missouri, were with him on the brief), for appellees.

Before Stone, Kenyon, and Van Valkenburgh, Circuit Judges

OPINION—Filed Nov. 26, 1932

STONE, Circuit Judge, delivered the opinion of the court:

Ehrhardt D. Franz left a testate estate to his wife, Sophie, and their ten children. A portion thereof later passed into a trust with the same persons as beneficiaries. Extended litigation developed, wherein, three and one-third of the ten interests represented by the children were arrayed against Sophie, the trustees and six and two-thirds of the children interests. The history, issues and results of that litigation are set forth in opinions in the various [fol. 30] appeals to this court.[1] For the present, it is helpful to note only that the litigation determined the interests of all parties to the trust to be (as far as pertinent here) that Sophie Franz had a life interest in the income from the trust which would terminate at her death and then the corpus be distributable by the trustees to the other beneficiaries. This applied to shares of stock of the Burroughs Adding Machine Company which were the main part of the trust estate. Sophie Franz died. Various of the beneficiaries have moved for distribution of the trust estate. The testate estate of Sophie is in course of administration in a probate court of Missouri. The State is entitled to collect inheritance taxes upon the estate of Sophie passing to her devisees. The appellants here represent five of the six and two-thirds children interests and were some of the defendants in this litigation and all are non-residents of Missouri.

Claiming that these six and two-thirds interests in the Burroughs stock held in the trust estate were subject to inheritance taxes as part of the estate of Sophie; that they had not been inventoried in her estate and that the State

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[1] 11 Fed. (2d) 854; 11 Fed.(2d) 858; 15 Fed. (2d) 797; 27 Fed. (2d) 101; 34 Fed. (2d) 353; 38 Fed. (2d) 605; 47 Fed. (2d) 507; 51 Fed. (2d) 1047.

had a lien thereon for such taxes, the State was given leave to intervene in this litigation. It filed its petition in intervention wherein it prays that a portion of this stock be transferred from the trustees to the court registry to secure the inheritance taxes thereon and be held "until it may be determined in the Probate Court of the City of St. Louis whether such stock should have been inventoried therein" as part of the Sophie Franz estate.

Shortly after the petition in intervention was filed, the representatives of five of the above six and two-thirds children interests filed their "Ancillary and Supplemental Bill of Complaint for an Injunction". This bill was directed at "the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H. Stern"—the last two being attorneys for the State in connection with inheritance taxes in the Sophie Franz estate. This bill alleged that the State and the other parties, as its attorneys, had caused to be served on the executor of the Sophie Franz estate a citation from [fol. 31] the Probate Court intended to discover and have inventoried as a part of such estate the Burroughs stock in the trust estate belonging to them; that such action was contrary to the decree of the trial court adjudging them entitled to receive this stock from the trustees and that the respondents would attempt to obtain orders in the Probate Court which would be "adverse and prejudicial to the rights and interests of the above named plaintiffs in this cause in this Court and orders, decrees and judgments which will prejudicially affect, impair and defeat the jurisdiction of this Honorable Court and the decree rendered by it in the premises." The prayer for restraint was from "directly or indirectly prosecuting further the said citation * * * and particularly from seeking or obtaining any order, decree or judgment therein until the further direction of this Honorable Court" and for temporary relief.

Thereafter, the State, specially appearing, filed its motion to dismiss the ancillary and supplemental bill on the grounds that it failed to state facts warranting the relief; that it was an action against the State which had not consented to be sued, in violation of the Eleventh Amendment;

that it sought to enjoin proceedings in a State court, in violation of Section 265 of the Code (U. S. C. A. Title 28, Section 729), and sought to interfere with the proper administration of an estate in the State probate court.

The trial court sustained the motion on the ground that the Eleventh Amendment prevented the action without the consent of the State and that the State had neither consented nor waived its rights to such immunity. Declining to plead further, an order was entered dismissing the ancillary and supplemental bill. This appeal is from that order.

Three issues are presented on this appeal, as follows: did the intervention proceedings constitute a waiver by the State of its immunity under the Eleventh Amendment; if no waiver, is this action within the immunity of the Amendment; is this action within the protection of Section 265 of the Code?

Waiver

The immunity from suit of a State under the Eleventh Amendment is a personal privilege which may be waived (Gunter v. Atl. Coast L. R. Co., 200 U. S. 273, 284) and this [fol. 32] rule is applicable to an intervention (Clark v. Barnard, 108 U. S. 436, 447-448). The action of the State claimed by appellants to constitute a waiver is its intervention in this main case. Appellees oppose that such is not the effect of the intervention. The motion of the State for leave to intervene prayed that it be permitted so to do as "a party defendant herein". Standing alone this would strongly suggest that the intervention was to be of a character which would constitute a waiver. This is, however, not conclusive. The petition in intervention must be examined to ascertain what right or remedy the State was seeking to obtain from the federal court. The substance of that petition is that certain stock of appellants within the jurisdiction of the federal court was claimed by the State to be derived through the estate of Sophie Franz and, therefore, subject to State inheritance taxes; that the State had a lien thereon for such taxes; that the stock had not been included in the inventory of the Sophie Franz estate in the probate court; that citation of the executor to show why this stock was not included had been issued and that matter would be determined in the probate court; that

these appellants have moved for distribution to them by the federal court. On the situation thus set out, the prayer is that a portion of this stock be transferred from the trustees to the registry of the court "to secure the assessment and collection" of the inheritance taxes and to be there held "until it may be determined in the probate court * * * whether said stock should have been inventoried therein" by the executor of the Sophie Franz estate. The State seeks no determination of any rights or title but expressly pleads that such determination will take place in the probate court. The only relief asked is that the federal court do not distribute this stock from the trustees to appellants but place it in its registry to abide the result of the determination of the rights of the State by the probate court. Obviously, the only purposes and possible results of the intervention would be to retain the stock within Missouri and in a place where it could be made to respond to the tax claims of the State if these claims (then being pressed in the probate court but undetermined) should be upheld. The substance of the relief sought is the temporary retention of custody by the federal court. This situation is essentially different from the statement in Cunningham v. Macon and Brunswick R. Co., 109 U. S. 446, 452 (relied upon by appellants) to [fol. 33] the effects that the rights of a State "will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court" where the State intervenes and "when she may have a lien or other claim on the property" in the custody of the court. That language had reference to instances where the State seeks to have its lien or claim established and enforced in the federal court having the property affected thereby. Such a case was Clark v. Barnard, 108 U. S. 436, where the State intervened to prosecute a claim to the fund in the custody of the federal court. Here, the State is not seeking any such relief but expressly disavowing it. We are not concerned on this appeal with the propriety of permitting the intervention or with its legal classification (as pro interesse suo or otherwise). The only present pertinency of the intervention is whether it is that character of appearance in the main litigation as will work a waiver of the immunity of the Amendment. Here the only thing sought is the temporary impounding of this stock

so that it may, possibly, be subjected to a lien which the State hopes to establish in another tribunal. Such action sought from the federal court is in no sense a matter of right but rather partakes of grace. No right of the State is sought to be presented to or determined by the federal court. We think this limited character of appearance in a federal court by a State cannot be regarded as a waiver of the immunity given by the Amendment.

Interference with Federal Jurisdiction

The basis of appellants' bill is that the respondents are seeking to invade the exclusive jurisdiction of the federal court and affect the decrees therein injuriously to their rights thereunder. Respondents deny any such intention or effect. It is necessary to determine this matter before we take up the effects of the Eleventh Amendment and of Section 265 of the Code.

The ancillary bill alleges and the motion to dismiss admits, for the purposes of the motion, that the rights and interests of these appellants in this Burroughs stock have been adjudicated in the federal court and they are entitled to distribution from the trustees after certain charges in [fol. 34] connection with the trust are satisfied. There is a similar admission that the proceedings in the probate court are designed to and may result in a determination of these same rights and interests which will be contrary to the result in the decrees of the federal court. These legal admissions are sufficient to establish, for the purposes of this appeal, that the State is claiming the right to relitigate in the probate court issues determined in the federal court. However, the State contends here it is doing nothing of the kind. It contends that the rights of only the plaintiffs in the main case were determined. Both parties have gone beyond the immediate pleadings in their presentation of this matter. Possibly we should abide by these pleadings, but since the parties have taken this excursion and since the questions here are of grave public consequence, we think it well to follow them so that our determination may rest upon the actualities of the real situation. We are further encouraged to do this because we can find the solution in our own opinions in various of the appeals in the main case. Therefore, we will inquire whether the contemplated action of the State in the probate court is designed to relitigate issues

concerning the interests of these appellants in this stock which have already been determined in the federal court. It is entirely true that the interests of these appellants are not formally and specifically declared in any of the decrees brought to our attention in the litigation and that prior to the third appeal (Buder v. Franz, 27 Fed. (2d) 101) they were contesting the position of the plaintiffs. That, however, is not determinative.

When this litigation started, none of these remaindermen were parties thereto. On the first appeal (Franz v. Buder, 11 Fed. (2d) 854), this court determined that the present appellants were "indispensable" parties to the litigation because the action was in the nature of an action in rem and concerned a res in which they were legally interested. It was because of our determination on that appeal that they were brought into the litigation. In that first appeal, jurisdiction of the res, which meant the trust estate, was decided to be the sole basis for retaining jurisdiction in this entire litigation, and that jurisdiction was, in that first opinion, declared to be "exclusive" and as involving "the potential necessity of assuming control of that property for the purpose of enforcing any decree that may be rendered, and of [fol. 35] preventing any disposition of the property that may impair the efficacy of that decree" (11 Fed. (2d), at 859).

Having established the jurisdiction to the res, and the litigation being over the rights of all parties thereto in the res, it was inevitable that the basis of the court's determination should apply with equal force to all parties. This situation is not only self-evident, but it is directly expressed in several of the opinions in these various appeals: In the second appeal (Franz v. Franz, 15 Fed. (2d) 797, 800), this court said: "While in the original bill the plaintiff only sought to establish and protect his undivided remainder interest, the fundamental questions of fact and law which would determine the extent of the plaintiff's remainder interests would likewise determine and affect the other remainder interests, and a decision adverse to the plaintiff, although it would not bind the owners of other remainder interests, would cast a cloud on their title, and for that reason we held the court ought not to proceed in their absence." On the third appeal (Buder v. Franz, 27 Fed. (2d) 101, page 114), this court said:

"In short, all of this Burroughs stock here involved is corpus in which Sophie Franz has only a life estate."

Also, several times there have been direct expressions concerning the effect of our decision on the merits upon the question of administration of any part of this Burroughs stock as a part of the estate of Sophie Franz. On the third appeal (Buder v. Franz, 27 Fed. (2d) 101, 108), after quoting from a provision in the trust agreement requiring "all" of the trust property to be administered in the estate of Sophie Franz upon her death, this court said: "If this quoted provision were followed, all of this property would be subject to various taxes, fees and costs (in course of such administration) which should not attach to any of such property belonging to the remaindermen because such would be deliverable direct to them by the trustees, upon termination of the life estate, and would not pass through the administration of the estate of Sophie Franz." In the same opinion (page 114), is:

"With the termination of the trust by her death, her absolute property will pass to administration (testate or intestate). As her death will likewise terminate the life estate, the remaindermen will, thereupon, be entitled to receive direct from the trustees the property not belonging to Sophie Franz absolutely—such property has no relation to her [fol. 36] absolute property and no administration can be had upon it."

On the fourth appeal (Franz v. Buder, 34 Fed. (2d) 353-356), this court said:

"At the death of Sophie Franz, the corpus of that part of the trust estate which she derived from the estate of her deceased husband will be divided in accordance with the provisions of the will of Ehrhardt D. Franz; while the rest of the trust estate will be divided and distributed according to the provisions of the will of Sophie Franz, or if she die intestate, then in accordance with the statutes of descent and distribution of the state of her domicile."

All of the above language was directly and particularly applicable to the stock in the Burroughs Adding Machine Company involved in the present intervention.

From this history of the main litigation it is clear that the rights and interests of these appellants in this stock were involved in and determined in the federal court. Therefore, it must be evident that the contemplated action of the State in the probate court must have the purpose to relitigate this very matter. Unless the State can there obtain a result directly opposed to the determination of the federal court, it will completely fail in its purpose. There could be no plainer case of interference with the jurisdiction of a court and defeat of its decrees entered within its jurisdiction.

The Eleventh Amendment

The question here is: Does the Eleventh Amendment deny jurisdiction to a federal court in an action by individuals against a State where the sole purpose and effect of such action is to protect the decrees of the federal court entered in a cause wherein it had jurisdiction?

This involves examination of the scope of that Amendment. The Amendment does not stand alone and no construction of its meaning is based upon such hypothesis can be sound. It is only a part of the Constitution and must be construed as such. Like all instruments, the Constitution is subject to the rational rule of construction that the parts must be understood in relation to each other and to the entirety in order to preserve the fullest vitality of the whole instrument in all of its parts. "It cannot be presumed, that any clause in the Constitution is intended to be without effect * * *, unless the words require it" (Marbury v. [fol. 37] Madison, 1 Cranch 137, *174; Prout v. Starr, 188 U. S. 537, 543). Therefore, when some particular clause, in its bare wording, seems to destroy or limit or qualify some other clause, it is the office of the court to examine the involved parts in the light of the entire instrument with a view to preserving such extent of each as can harmoniously live together. Such rule has been applied to this Amendment. In its broad literal meaning—standing alone—this Amendment would prohibit all jurisdiction to any federal court of any case against a State by a citizen of another State or of a foreign state. Such was urged as its meaning in the historic case of Cohens v. Virginia, 6 Wheat. 264, which involved a writ of error to a State court where the plaintiff in error contended that his prosecution under

a State statute was violative of the National Constitution. There, the jurisdiction of the Supreme Court was predicated upon that part of Clause 1 of Section 2 of Article III of the Constitution which declares: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution * *." Against this predicate, it was urged that this was a suit against a State and, therefore, proscribed by the Eleventh Amendment even if it did involve the National Constitution. In one of the greatest opinions of his career, Chief Justice Marshall preserved the full effect both of the clause in Article III and of the Amendment. That construction determined that the meaning of the Amendment was less than its isolated wording. Also, the great Chief Justice reviewed the history and purpose of the Amendment and declared: "* * * It was intended for those cases, and for those only, in which some demand against a State is made by an individual, in the courts of the Union" (*407). In another case (Ex parte State of New York, 256 U. S. 490), the scope of the Amendment was broadened beyond the wording to accord with the spirit thereof—suits in admiralty being adjudged within the Amendment although the wording thereof covered only suits "in law or equity".

The instant case presents the same character of situation. As that case was an examination of the scope of the Amendment in view of a portion of Clause 1, Section 2 of Article III of the Constitution, so this case is an examination of the scope of the Amendment in view of certain portions of Sections 1 and 2 of Article III of the Constitution. The parts [fol. 38] of Article III involved are "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish" (Section 1) and "The judicial Power shall extend to all cases, in Law and Equity, * * * between citizens of different States" (Section 2). Under these constitutional sanctions, Congress has created the inferior federal courts and prescribed the extent to which and the conditions under which they shall exercise this "judicial power". Among these prescriptions of judicial power by Congress under the above Constitutional provisions are the grant of jurisdiction to the district courts "of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive

of interest and costs, the sum or value of $3,000, and * * * is between citizens of different States * * *" (U. S. C. A., Title 28, Section 41(1); Judicial Code, Section 24 amended), and that "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law" (U. S. C. A., Title 28, Section 377; Judicial Code, Section 262).

These grants of jurisdiction are within the power given Congress under the clauses of the Constitution above quoted. A part of that granted jurisdiction is the power and the duty to protect that jurisdiction (Kline v. Burke Construction Co., 260 U. S. 226; French v. Hay. 22 Wall. 250, 253). This is not merely a rule of comity but "a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience." (Covell v. Heyman, 111 U. S. 176, 182; Kline v. Burke Constr. Co., 260 U. S. 226, 229). Within that protective power is, of course, the judgments and decrees of federal courts in cases where they possessed jurisdiction to enter them (Dietzsch v. Huidekoper, 103 U. S. 496).

A long unbroken line of decisions in the Supreme Court has put these rules of law beyond challenge. They have been applied in every situation necessitating this protection and to all parties attempting to interfere with an exclusive jurisdiction in the federal courts. There have been two applications (by this court) in the litigation of the main case here (15 Fed. (2d) 797 and 51 Fed. (2d) 1047). Usually, the situation has been that of attempted relitiga-
[fol. 39] tion in the State courts but it has been applied to an Act of a State Legislature (U. S. v. Peters, 5 Cranch 115). Usually, the parties have been private litigants but it has been applied to officials acting solely as State officers (Prout v. Starr, 188 U. S. 537).

The situation here is that a State is seeking to have a federal court, which has full jurisdiction over a res and which has entered its final decrees fully adjudicating the rights of these appellants in that res, transfer to and hold in its registry the property representing the interests of appellants in that res until the State can relitigate, in its own courts, the very issues of interest and title already

determined by the decrees of the federal court. The State is not seeking permission of the federal court to allow this relitigation. Obviously, it contemplates such relitigation. Its purpose in coming into the federal court having the res in jurisdiction is to have that court retain possession thereof so that if the State litigation results in a determination contrary to that of the decrees in the federal court, the State will have within its territory property from which it can realize upon this adverse determination. Faced with this threatened violation of their rights under the federal court decree, appellants have filed their ancillary proceeding to enjoin the State from thus disturbing their rights adjudicated and settled in the federal court. To this relief, the State interposes the proposition that the court cannot act because the Eleventh Amendment denies it jurisdiction to act.

Baldly stated, the proposition is that a federal court is stopped by the Amendment from preventing a State going into its own courts and overthrowing a decree which the federal court had jurisdiction to enter and has entered. This is a startling proposition. It cannot harmoniously exist with the conception that the National Constitution has empowered Congress to grant to its established courts an attribute of judicial power which has been universally accorded all American courts (National or State) from the beginning of our present government—even back to the Continental courts before the Confederacy (U. S. v. Peters, 5 Cranch 115).

Here, the State is seeking by action of its executive branch through its courts to annul in part the decrees of a federal court. With this in mind, we may well para-[fol. 40] phrase the language of Chief Justice Marshall merely by substituting "executives and courts" for "legislatures" when he said:

"If the legislatures [executives and courts] of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania [Missouri], not less than the

citizens of every other state, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves" (U. S. v. Peters, 5 Cranch 115, 136; quoted with approval in Rhode Island v. Mass., 12 Pet. 657, 751).

If this Amendment may be fairly construed so as to preserve the full vitality of its purpose without producing the unfortunate result apprehended by the great Chief Justice and evident to all, that should be done. To do so is but applying the rule that all provisions of the Constitution are of equal validity (Prout v. Starr, 188 U. S. 537, 543). The purpose of the Amendment was to prevent enforcement of claims against an unwilling State (Cohens v. Virginia, 6 Wheat. 264, *407). This purpose is in no wise aided nor harmed by affecting the effectiveness of a federal court decree in an action between individuals. On the other hand, to admit the proposition that a State is immune from this judicial power in a federal court to protect its lawful jurisdiction and decrees introduces an unhappy element of discord between the Nation and the States, an unfortunate weakening of the legitimate and necessary powers of the federal judiciary and an uncertainty and instability as to private rights. We think the Amendment carries no such poison. It can be given its full intended scope and effect without thus crippling the judicial power provided for in other parts of the Constitution.

Section 265 of the Code

This section provides that no court of the United States shall grant an injunction to stay proceedings in a State court, except where authorized in bankruptcy proceedings (U. S. C. A., Title 28, Section 379). The relief sought by [fol. 41] the ancillary bill is to enjoin the State and its attorneys from proceeding in the probate court—obviously, an injunction "to stay proceedings" in a State court. The Supreme Court has said:

"The restrictions embodied in the section [this section] were, therefore, but a partial accomplishment of the more comprehensive result effectuated by the prohibitions of the Eleventh Amendment. Both the statute and the Amendment relate to the power of courts of the United States to

deal, against the will and consent of a State, with controversies between it and individuals" (Gunter v. Atl. Coast L. R. Co., 200 U. S. 273, 292).

We might well conclude that since the broader Amendment does not prevent an action against a State based upon protection of lawful existing jurisdiction in a federal court, that the narrower statute could go no further. However, there is no reason suggested and we know of none why the statute should be differently applied because of the character of the parties to the litigation in the State court. The character of parties does not enter into the statute. As to the statute alone, a State is like any other party. The decisions are many that this statute does not apply where the stay of proceedings in the State court by injunction is solely to protect the jurisdiction of the federal court.

"It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court" (Kline v. Burke Constr. Co., 260 U. S. 226, 229).

Conclusion

Our conclusion upon the effect of the Eleventh Amendment and of Section 265 of the Code fits accurately into an expression in the Gunter case that "Indeed, the proposition that the Eleventh Amendment, or section 720 of the Revised Statutes [section 265 of the Code], control a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion" (200 U. S., at 292). Our conclusion upon the appeal is that the court below erred in dismissing the ancillary and supplemental bill for lack of jurisdiction. The basis of that jurisdiction is the preservation of its own jurisdiction and decrees.

[fol. 42] Since the only issue on this appeal is jurisdiction to entertain the ancillary and supplemental bill, we might rest here. However, it is well to state that the extent to which this jurisdiction should be exercised—possibly, the extent to which it exists—is the protection of the

jurisdiction and decrees of the trial court. This cautionary statement is prompted by an allegation in the petition in intervention. In addition to allegations that appellants had "by pleadings filed in this cause" (the main case) transferred their interests to Sophie Franz, there is the allegation that this was also done 'by diverse acts". What "acts" are meant is not stated. If this means conveyances or anything not considered in the main case, the determination thereof in some other court would not affect the jurisdiction in the main case. It would be foreign to that litigation. However, if all that is meant is something involved in this main litigation (such as the instruments dated January 7 and 30, 1920 (referred to in 27 Fed. (2d) at 110 and 113) or the E. D. Franz Estate matter (referred to in 47 Fed. (2d) at 508), then such "acts" would affect the jurisdiction of the federal court which has already litigated those matters. On the hearing on the merits of the ancillary and supplemental bill the trial court will be informed and can suit its action so as to protect its jurisdiction and that alone.

The cause will be reversed with directions to set aside the orders sustaining the motion to dismiss and dismissing the ancillary and supplemental bill and otherwise to proceed thereafter in accordance with this opinion.

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, NOVEMBER TERM, 1932

No. 9428

JOHANNA F. FISKE, AMANDA F. WHEELER, HENRIETTA A. HOLDOWAY, Adelaide Zimmerman, and Otto B. Franz, Appellants,

vs.

STATE OF MISSOURI, STRATTON SHARTEL, Attorney General of the State of Missouri; Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri; Richmond C. Coburn, and Henry H. Stern

DECREE—November 26, 1932

Appeal from the District Court of the United States for the Eastern District of Missouri

This cause came on to be heard on the transcript of the record from the District Court of the United States for

the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the orders of the said District Court appealed from, in this cause be, and the same are hereby, reversed with costs; and that the appellants have and recover from appellees their costs of appeal herein expended.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to set aside the orders sustaining the motion to dismiss and dismissing the ancillary and supplemental bill and otherwise to proceed thereafter in accordance with the opinion of this Court.

November 26, 1932.

[fols. 44-48] Petition for rehearing, covering five pages, filed December 24, 1932, omitted from this print. It was denied, and nothing more by order of January 17, 1933.

[fol. 49] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—January 17, 1933

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellees.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

January 17, 1933.

[fol. 50] In United States Circuit Court of Appeals, Eighth Circuit

Clerk's Certificate

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries

and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein Johanna F. Fiske, et al., were Appellants and the State of Missouri, et al., were Appellees, No. 9428, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the sixth day of March, A. D. 1933, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the Eastern District of Missouri.

In Testimony Whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-fourth day of March, A. D. 1933.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal of United States Circuit Court of Appeals, Eighth Circuit.)

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 15, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,570. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 27. State of Missouri and Franklin Miller, etc., petitioners, vs. Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, et al. Petition for a writ of certiorari and exhibit thereto. Filed April 15, 1933. File No. 37,570.